LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 19 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 316

JAMES DONALD EDWARDS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
410 Douglas Building
Los Angeles, California 90012
Attorney for Petitioner

E. L. MIDDENHALL, INC., 916 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

1. Opinion of the Court Below 2
2. Statutory Provision Sustaining Jurisdiction 2
3. Question Presented and How Raised 2
4. Statutes and Regulations Involved 2
5. Statement of the Case 3
6. The Facts 3
7. Reasons for Granting Writ 4
8. Argument 4
   (1) The Prima Facie Case 5
   (2) The Unfairness of the Blocking of a Defense 7
      A. Intent of Congress 7
      B. The Procedures 8
      C. Use of the Exhaustion Doctrine in Draft Cases Is Unfair 8

Conclusion 14

Appendix A—Opinion of the United States Court of Appeals for the Ninth Circuit A1

Appendix B—Order Denying Petition for Rehearing A8

Appendix C—First Amendment, U. S. Constitution, and Section 456(j), Universal Military Training and Service Act A8, A9

TABLE OF CASES

Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U.S. 752, 91 L.Ed. 1796 (1947) 12

Billings v. *Truesdell*, 321 U.S. 542 (1945) 11

Cox v. *Wedemeyer*, 192 F.2d 920 (9th Cir.) 8

Dickinson v. *United States*, 74 S. Ct. 152, 346 U.S. 389 (1953) 5, 6, 7

Eccles v *Peoples Bank*, 333 U.S. 426, 92 L.Ed. 784 (1948) 13
Estep v. *United States*, 327 U.S. 114 ..... 10, 12
Ex parte Cohen, 254 Fed. 711 10
Ex parte Fabiani, 105 F. Supp. 139 (1952), E. D. Penna. 13
Falbo v. *United States*, 320 U.S. 549 ..... 10, 11
Levers v. *Anderson*, 326 U.S. 219, 90 L.Ed. 26 (1945) 13
Schwartz v. *Strauss*, 206 F.2d 767 10
United States v. *Abilene & So. Ry. Co.*, 256 U.S. 274, 68 L.Ed. 1016 (1924) 12
United States v. *Giessel*, 129 F. Supp. 223 9
United States v. *Harvey*, 131 F. Supp. 493 9
United States v. *Palmer*, 3d Cir., 1955, 223 F.2d 893 10
United States ex rel. Beye v. *Downer*, 143 F.2d 125 9
United States ex rel. Filomio v. *Powell*, 38 F. Supp. 183 9

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Amendment 1, United States Constitution 2, A8
32 C.F.R. § 1600, et seq. 8
32 C.F.R. § 1622.14 (A) 5
18 U.S.C. § 3231 2
28 U.S.C. § 1254 (1) 2
50 U.S.C.A. App. § 456 (j) 2, A9
50 US.C. App. § 1 (c) 7
50 U.S.C. App. § 456 (j) 5, 7

OTHER AUTHORITIES

Professor Kenneth Culp Davis, Administrative Law (West Publishing Co.) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

JAMES DONALD EDWARDS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages 5- ..... It is also set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals was entered on June 21, 1968 [R. 7];* also see Appendix B to this petition. This Petition for Writ of Certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTION PRESENTED AND HOW RAISED

The sole question presented is whether a Selective Service System registrant, presenting a prima facie claim for a conscientious objector classification but not perfecting an administrative appeal after a local board rejection is, nevertheless, entitled to defend a prosecution for failure to submit to induction on the basis that he was misclassified contrary to all the evidence before the board.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.). They are set forth in Appendix C.

---

*R. refers to the Record of Proceedings in the Court of Appeals.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act, 50 U.S.C.App. § 462 [Tr. 2];* that he became a registrant of Local Board No. 115 of the Selective Service System in the County of Los Angeles, State of California and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 115 to submit to induction into the armed services of the United States [Tr. 2].

Petitioner pleaded not guilty, waived jury trial and was tried on February 6, 1967 [Tr. 24]. A written motion for judgment of acquittal was filed [Tr. 21-22]. The motion was denied and the petitioner was found guilty on February 20, 1967, and thereafter was sentenced and admitted to bail pending appeal [Tr. 30].

6. THE FACTS

Petitioner registered with Local Board No. 115 on January 16, 1963 [Ex. 1-2].**

On April 8, 1964 he executed and filed the Classification Questionnaire (SSS Form No. 100), answering all questions that were applicable to him [Ex. 4-11].

On April 8, 1964, appellant filed his Classification Questionnaire (SSS Form No. 100) and signed Series VIII [Ex. 7] indicating he was a conscientious objector.

He was mailed the Special Form for Conscientious Objector (SSS Form No. 150) and timely returned it, fully

---

*Tr. refers to the Transcript of Record (trial level).

**Ex. refers to the Government's Exhibit, the selective service file of appellant. The pagination is ordinarily pencilled at the bottom of each sheet of the exhibit.

executed [Ex. 12-15]. In this form he showed he was one of Jehovah's witnesses and believed in a Supreme Being and, in an appended statement (the spaces provided on the form for answers being only a few lines each) showed that his religious beliefs took precedence over any earthly command, the origin of his beliefs being "a thorough study of the Bible with my family" and, in all other respects made as full a showing as is possibly required, presenting at the very least a prima facie case [Ex. 16].

Nevertheless, despite anything in the file to the contrary, or in existence, he was classified in Class I-A and subsequently ordered to report for induction.

7. REASONS FOR GRANTING WRIT

The sole question raised by the petitioner calls for a definitive answer to the oft-raised question: is a Selective Service System registrant entitled to a defense in court, on a claim of an arbitrary ignoring of an unrebutted prima facie case for a conscientious objector classification, despite the fact he took no administrative appeal?

The question is one of national import because thousands of registrants are in the predicament of petitioner: they are young and inexperienced, and are given wholly insufficient warning or information on the subject of how to help themselves get ready for court contest.

8. ARGUMENT

The argument is being divided into two parts:

(1) A prima facie case was presented, and

(2) It is unfair to block a defendant, situated as this petitioner, from presenting his defense in a criminal case.

(1) The Prima Facie Case

Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456 (j)), provides:

> "Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . ."

Section 1622.14 (A) of the Selective Service Regulations [32 C.F.R. 1622.14 (A)] provides:

> "1622.14 Class I-O: Conscientious Objector Available for Civilian Work, Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The local board's duties and the courts' scope of review in draft cases were spelled out by this Court in *Dickinson* v. *United States*, 74 S. Ct. 152, 157, 158, 346 U.S. 389 (1953):

> "The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'.

However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."

". . . when the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson put the proposition more bluntly (74 S. Ct. 152, 159):

". . . Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

In the present case, petitioner made out a prima facie case for a I-O classification when he filed with the local board his Form 150 in which he claimed conscientious objection to war in any form based upon religious training and belief.

The government's case (the appellant's Selective Service file placed in evidence as the government's exhibit) is totally barren of any evidence whatsoever tending to cast the slightest doubt on appellant's sincerity.

Petitioner claimed membership in the Watchtower Society as one of Jehovah's witnesses.

The Court may take judicial notice of the fact that although Jehovah's witnesses usually have trouble later in the administrative procedure, because of their claim to be ministers, they almost never have trouble getting a I-O classification. There is not a single shred of evidence in the record to cast doubt on appellant's bona fide membership in Jehovah's witnesses and belief in their creed.

Thus the local board's denial of I-O classification to petitioner was without basis in fact and upholding that arbitrary classification would be contrary to the rule of law as set forth in *Dickinson*, or at least, its spirit.

(2) The Unfairness of the Blocking of a Defense

This refers to the judge-made law, namely, the doctrine of exhaustion of administrative remedies.

Our argument, in brief, is that what the courts have constructed they may limit. We will show they have already done so, sometimes explicitly, sometimes implicitly.

A. Intent of Congress

Although Congress clearly intended to expeditiously raise an army, and not to permit undue, delaying litigation, it also clearly declared that the procedures for raising this citizen (conscript) army were to be fair and just:

Item: Congress declared in § 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "*Nothing* contained in this Title shall be construed to require *any* person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Emphasis added).

Item: Congress declared in Sec. 1 of the Act: "Policy and intent of Congress:

> (c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

B. The Procedures

Pursuant to the act, regulations were adopted [32 C.F.R. § 1600, et seq.] that give the administrative procedures.

These provide for classification action by the local board and for an administrative agency appeal, to a state appeal board.

The notification of the right to an administrative appeal is faulty and the notifications given prior to March 1967 were severely criticized by the National Advisory Commission on Selective Service (the Burke Marshall report): In Pursuit of Equity: WHO SERVES WHEN NOT ALL SERVE?

After this report, by a change in the regulations, an additional notice has been sent registrants whose claims are rejected by the local board.

Petitioner was processed before this procedural improvement [Ex. 11]. A failure to appeal by one processed before the corrective change deserves some indulgent consideration. However, petitioner does not depend on this factor but argues, next, that the exhaustion doctrine should not be applied to such persons.

C. Use of the Exhaustion Doctrine in Draft Cases Is Unfair

The chief purpose of the doctrine of exhaustion of administrative remedy is to relieve the courts of a burden better borne by specialists in the various administrative agencies.

The doctrine was not formulated to deprive young men, unassisted by counsel, of their day in court: cf. *Cox* v. *Wedemeyer*, 192 F.2d 920, where the Ninth Circuit pointed out that, ". . . the procedure established . . . was

designed to fit the needs of registrants unskilled in legal procedure . . . and none of them represented by counsel." [922-923]

The doctrine of exhaustion of administrative remedies should not be considered inflexible. Many special circumstances should excuse the registrant. This general proposition was restated in *United States* v. *Harvey*, 131 F. Supp. 493:

> ". . . the rule that administrative relief must be exhausted before resorting to the courts did not originate in the constitution, or any statute, but came into being simply as a point of judicial policy adopted by the courts, and the courts do not recognize that it must always be applied in hidebound fashion. The rule will be passed by, if there is good reason for making an exception, and that has been done by both the federal and state courts." [496]

So, in *U. S. ex rel. Filomio* v. *Powell*, 38 F. Supp. 183, on page 187, the Court observed:

> "Evidence is conflicting as to whether Filomio demanded the questionnaire in order that he might perfect his appeal. We do not feel that it was readily available, and hence his omission in this respect was beyond his control."

In *United States ex rel. Beye* v. *Downer*, 143 F.2d 125, the court concluded that it was the local board's fault that Beye had been deprived of an appeal. In *United States* v. *Giessel*, 129 F. Supp. 223, a similar conclusion was reached.

Even where the selective service agency is wholly without fault, the registrant can be permitted to present his facts in court. This is the holding in an old draft case, *Ex parte Cohen*, 254 Fed. 711:

> "He ought not to be denied his rights to habeas corpus, where his personal liberty and nationality are involved because of his failure to do a vain thing." [p. 713]

Certainly where jurisdictional grounds are urged, the registrant should be permitted to present his case in court. The three-judge-minority opinion in *United States* v. *Palmer*, 3d Cir., 1955, 223 F.2d 893, emphasized a point included in one that petitioner Edwards raised: A classification without basis in fact is beyond the jurisdiction of the local board and a defense based on such lack of jurisdiction is permitted by *Estep* v. *United States*, 327 U.S. 114. The Second Circuit, also, had expressed grave doubts that a registrant could be denied the opportunity to present his facts in court, ". . . where, on undisputed facts, the Boards' lack of jurisdiction is manifest." *Schwartz* v. *Strauss*, 206 F.2d 767.

It was early established that the selective service administrative process is a continuous one, beginning with registration and ending at the induction ceremony. *Falbo* v. *United States*, 320 U.S. 549; *Estep, supra.* The administrative process is like a ladder; the registrant must go to the very end [Edwards did; he reported at the induction station], but is there a requirement that he step on every rung? No. For example, who would contend a selective service defendant is not entitled to present his defenses if he did everything except ask for a Personal Appearance Hearing? Yet the Personal Appearance Hearing is the most important rung in the ladder, for it is the only opportunity the board ever has to look the registrant in the eye and hear his views for deferment.

This Court's Selective Service cases lay down no inflexible rule of exhaustion and a mandatory rule is contrary to the general rule of exhaustion of administrative remedies requirement which has been formulated by this Court as a flexible rule.

In *Falbo, supra,* "petitioner urged that the District Court had erred in refusing to permit a trial de novo on

the merits of his claimed exemption." The Board had classified a Jehovah's witness as a conscientious objector rather than a minister. Since, at that time, the order to report to a Civilian Public Service camp was not the final step in classification (he was later physically examined and might be rejected and placed in Class IV-F), the Court viewed the order to report as "an intermediate step" and not reviewable (as intermediate orders are usually not reviewable). The Court did not even refer to "exhaustion". It framed the issue and its ruling thus:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.
>
> "We think it has not." (320 U.S. at 554).

In *Billings* v. *Truesdell*, 321 U.S. 542 (1945), the issue again was not the rule of exhaustion of remedies. A registrant was denied a classification as a conscientious objector. He reported to the army when directed to, but refused to submit to induction. The army claimed Billings was subject to military jurisdiction. The Court held he was not. In explaining that Billings had tried to complete the selective service process as outlined in the *Falbo* case, the Court for the first time referred to "exhaustion". The Court definitely did not extensively consider the rule; it did not lay down a mandatory rule; it merely said:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his

administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the Falbo case. . . ." (321 U.S. at 558).

Again in the *Estep* case (1946), the Supreme Court did not decide that a person must exhaust administrative remedies. The real issue was whether Selective Service classifications could be reviewed in criminal prosecution.

On the other hand, if the Selective Service cases be deemed to lay down a mandatory rule requiring exhaustion of administrative remedies, in all instances, then they are an anachronism in the law—for in all other fields the courts have stated the exhaustion rule as a flexible requirement:

> "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 773, 91 L.Ed. 1796 (1947).

> ". . . Whether it (the Court) should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion." *U. S.* v. *Abilene & So. Ry. Co.*, 256 U.S. 274, 68 L.Ed. 1016 (1924).

> ". . . In construing the Act, however, we must be mindful of the 'long-established rule of judicial administration that no one is entitled to judicial relief for a supposed' or threatened injury until the prescribed administrative remedy has been exhausted.' Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51. But this rule does not automatically require that judicial review must always be denied where rehear-

ing is authorized but not sought. This is shown by our past decisions (citing cases) from which we see no reason to depart." *Levers* v. *Anderson*, 326 U.S. 219, 222, 90 L.Ed. 26 (1945).

"A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before completion of the administrative process." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434, 92 L.Ed. 784 (1948).

Professor Kenneth Culp Davis, the recognized authority, in his book, Administrative Law (West Publishing Co.), says this of the exhaustion rule:

"The courts usually follow what the Supreme Court calls, 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' But even though the Supreme Court customarily states the rule without qualification, the courts in many cases relax the rule. To determine when the rule will be or should be applied or relaxed requires analysis not merely of holdings but also of reasons behind the holdings. . . .

"The principal reasons for requiring exhaustion of administrative remedies relate to efficient management and orderly procedure, use of the agency's specialized understanding, adequacy of legal remedies, exclusive jurisdiction, and statutory requirements of final order." (Davis, p. 615).

In *Ex parte Fabiani*, 105 F. Supp. 139 (1952), E. D. Penna., a medical student in Italy was allowed to defend against a I-A classification though he had not exhausted his administrative remedies. (He not only had not appealed, but he had not reported for physical examination

or for induction.) The Court cited case after case where lack of due process and clear error of law were defenses to prosecution for selective service violations and concluded that exhaustion was excused under these cases.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

J. B. Tietz
410 Douglas Building
Los Angeles, California 90012
Attorney for Petitioner.

July 19, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES DONALD EDWARDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21,879

[May 10, 1968]

Appeal from the United States District Court for the Central District of California

Before: BARNES and ELY, Circuit Judges, and FOLEY, District Judge*

ELY, Circuit Judge:

On February 13, 1967, appellant Edwards was found guilty of having refused induction into the armed services in violation of section 12 of the Universal Military Training and Service Act. 50 U.S.C. App. § 462. He was thereafter sentenced to the custody of the Attorney General for a period of three years. This appeal followed. Our jurisdiction rests upon 28 U.S.C. §§ 1291, 1294.

On January 16, 1963, Edwards registered with Local Board No. 115, and on April 8, 1964, the local board received a completed Classification Questionnaire (SSS Form No. 100) from him. In this questionnaire Edwards claimed to be a conscientious objector and requested a Special Form for Conscientious Objector (SSS Form No. 150). Subsequently the local board also received a completed

*Honorable Roger D. Foley, Chief United States District Judge for the District of Nevada, sitting by designation.

copy of this special form, wherein Edwards again claimed to be a conscientious objector. On June 8, 1964, however, the local board placed Edwards in Class I-A. On the following day, notice of this classification was mailed to Edwards. No appeal was taken from the classification.

On May 20, 1965, Edwards was ordered to report for a physical examination on June 11, 1965, and on that date he reported and was found acceptable. Four days later, on June 15, 1965, he notified the local board that his name had been changed by court order from James Donald Humphreys to James Donald Edwards. At that time he also requested a new Notice of Classification (SSS Form No. 110) to replace the one which he had received earlier, and he supplied the local board with a Current Information Questionnaire (SSS Form No. 127), which disclosed that he had been married three days earlier.

On October 25, 1965, the board again classified Edwards as I-A, and on October 29, 1965, a notice of this action was mailed to him. No attempt was made to appeal this second classification action. On December 23, 1965, Edwards was ordered to report for induction on January 11, 1966. On that date he reported to the induction center and completed various steps preliminary to induction; however, he refused to be inducted.

Edwards' principal contention is that the local board's denial of a conscientious objector classification (class I-O) was without basis in fact and was therefore contrary to law. See *Dickinson* v. *United States*, 346 U.S. 389, 98 L. Ed. 132, 74 Sup. Ct. 152 (1953). We do not reach this issue. It is well settled that a registrant may not challenge his classification in the courts where, absent exceptional circumstances, he has failed to exhaust his administrative remedies by appealing from the local board's classification, as

authorized by 32 C.F.R. § 1626.2. *Prohoroff* v. *United States*, 259 F.2d 694 (9th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Evans* v. *United States*, 252 F.2d 509 (9th Cir. 1958); *accord, e.g., Thompson* v. *United States*, 380 F.2d 86 (10th Cir. 1967). As indicated above, Edwards did not attempt to appeal from either classification decision made by his local board. It clearly appears that he was aware of his right to appeal.[1] His direct testimony at the trial includes the following:

> "Q. When you filled out the classification questionnaire [following the initial registration] on Sheet No. 7 you indicated you were not formally ordained as one of the ministers of Jehovah; correct?
>
> "A. True.
>
> "Q. When you were interviewed by FBI Agent Harwell, as is shown in Government's Exhibit No. 2, you told him that you didn't appeal. Why? What reason did you give him?
>
> "A. Well, at this time I had just become acquainted with the organization and I wasn't really too sure of that fact. When I did fill out the conscientious objector form I was assured of that later on when I was dedicated as an ordained minister, that I would be able to change my classification.
>
> "Q. At the time when your I-A card came you didn't have a complete commitment, or did you?

1. There is some indication in the record that Edwards did not believe that he had a right to appeal from the second classification, since the card sent to him appeared to be a duplicate of his earlier one with only a change in the name. He testified that he received the card in October 1965, "[b]ut on the back of it it said, 'This card must be returned' within so many days for an appeal, I believe it was. But on the back it had the date 1964." This card was not received into evidence. Appellant admits in his closing brief that the Government "correctly" states that "[o]n October 25, 1965, defendant was again classified I-A by the Board. . . ." As noted previously, Edwards made no attempt to appeal from this second classification.

"A. Well, at that time I was still not ordained. I felt that if they refused my appeal it would be on grounds that I was not an ordained minister, so I felt at that time that I shouldn't appeal it because I wasn't ordained."

Clearly, these reasons[2] present no exceptional circumstances excusing Edwards' failure to appeal. We are precluded, therefore, from reviewing the classification.

Edwards' second contention is based upon his vague assertions that there is "at the least doubt as to whether he was administratively processed by the right board members." Our review of the record convinces us that appellant's contention in this regard is totally devoid of merit.

Lastly, it is argued "that the induction ceremony was contrary to law and prejudicial to appellant." The appellant's selective service file, introduced into evidence by the Government, contains a letter to the United States Attorney written on behalf of the Commander of the Induction Center. The letter describes the manner in which Edwards had been processed and had refused to be inducted.[3] This commonly used form letter, which is printed

---

2. The ministerial classification which Edwards desired (class IV-D) would have exempted him both from military service and from any civilian work assignment. He was apparently not interested in appealing in order to obtain the conscientious objector classification (class I-O) that he here claims should have been granted him, since the record indicates that he would not have accepted the civilian work assignment required for persons so classified. See 32 C.F.R. §1660.20. The record contains no indication that Edwards ever attempted to obtain a IV-D classification from the board.

3. This letter, in part, recites:

"All registrants who have been determined to be fully qualified for induction in all respects were assembled. The Induction Officer informed them of the imminence of induction, quoting the following:

'You are about to be inducted into the Armed Services of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced fol-

with blanks for the appropriate names, dates, etc., states, in effect, that the individual concerned was processed in conformity with Army Regulation 601-270, the regulation prescribing the proper procedure for induction processing. Edwards testified, however, that he was not processed in exactly the same manner as that stated in the form letter.[4]

---

lowing your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the Armed Service indicated'.

"When Mr. James Donald EDWARDS name and service were called, he refused to step forward. He was removed quietly and courteously from the presence of the group about to be inducted and processed as prescribed in paragraphs 36b and 40c, AR 601-270, dated 11 March 1960, as amended.

"Mr. James Donald EDWARDS persisted in his refusal to submit to induction. He was informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He was informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than five years, or a fine of not more than $10,000, or both. He was then informed again of the imminence of induction by the Induction Officer, who quoted the following:

'You are about to be inducted into the Armed Services of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the Armed Service indicated'.

"Mr. James Donald EDWARDS name and service were again called, but he still refused to step forward."

4. Upon direct examination, Edwards testified as follows:

"Q In what way does . . . [the letter describing the induction procedure] not precisely relate what actually happened?

"A Well, just a second. They did not at the time when they were giving the oath give me the oath. They sent me down to the executing captain's office before giving me the oath.

"Q When you say 'oath' what do you refer to?

"A Oh, the pledge that—they did not ask me to stand, they did not ask me to step forward. I was sitting there and, you could call it, shooting the breeze. The guys up there who —it was a sailor, I believe it was. He was giving the oaths that day. They were sitting there talking, and he says, 'This

According to his testimony the principal difference, in essence, was that, after he had indicated he would refuse

---

is just preliminary.' He said, 'Is anybody here going to refuse induction?' I raised my hand. He then called for a soldier to take me down to the executing captain's office.

"Q Then what happened there?

"A Well, I walked into the office and the executing captain looked at me, asked me what I was there for. He told me to wait outside and then he would call me.

"At that point I went outside. A few minutes later he called me into his office where a Marine sergeant stood and another gentleman in a uniform and the captain.

"At that time he asked me on what grounds was I refusing induction. It was on grounds of religious beliefs.

"They asked me to sit down. I sat down. The Marine sergeant told me to stand, and he gave me the oath. I gave the oath and I didn't step forward.

"He says, 'Sit down again.'

"So I sat down again.

"He says, 'Step forward.'

"I didn't step forward.

"He said, 'Okay,' he says, 'the FBI will be getting in contact with you.'

"And they made me go outside and sign a statement on what grounds I didn't submit to induction.

"Q Is that all that took place?

"A Well, the other gentleman in there, I don't know what he was in there for, but he was asking me a few questions. He wanted to know why I wouldn't take a job, and I told him, 'Because it would be a compromise.'

"Q What job?

"A Well, they didn't offer me any job.

"Q Then go on.

"A He just asked me a few questions. He says, well, why wouldn't I work in a hospital. I felt at that time I would tell him—

"Q Excuse me. Did he ask you why you wouldn't work in a hospital?

"A No. Before I got it out the captain answered it for him. He said that, 'They would believe that they would patch somebody up and send them back out to kill somebody.' He said, 'It's kind of a crazy thing, you know.'

"Q Well, what else happened?

"A That was just about it. That's all that took place."

In the cross-examination, there appears the following:

"Q Now [your attorney] . . . showed you . . . [a copy of the letter] and asked you to read . . . [it] on your direct examination. I will show them to you again. He asked you

induction, he was removed from the group about to be inducted and that he was given the prescribed two opportunities for induction in a separate room.[5] Assuming, *arguendo*, that such was the fact, it is nevertheless clear that Edwards was not prejudiced thereby. See *Bradley* v. *United States*, 218 F.2d 657, 660-61 (9th Cir. 1954), *rev'd on other grounds*, 348 U.S. 967, 99 L. Ed. 753, 75 Sup. Ct. 531 (1955). The essential requirements of the induction process were properly met. Compare *Chernekoff* v. *United States*, 219 F.2d 721, 724-25 (9th Cir. 1955). Where such is the case and where it is clear that the individual in-

---

a question which you answered that was substantially what happened down there; is that correct?

"A That's correct.

"Q Now, isn't it a fact, Mr. Edwards, that prior to your being taken to the captain's office that another member of the Armed Forces indicated that, 'You're about to be inducted into the Armed Forces,' and that, 'Anybody who is not going to be inducted should indicate thus'?

"A Well, I guess you might call it that. He didn't ask anybody to stand at that time or—he just said, 'This is'—everybody was still talking and he was, you know, how they do down there, they—I don't know whether you do or not. But they talk and they tell you where you are going to go and where you are going to be shipped out probably to.

"They were talking. He said, 'Oh, yeah,' he said, 'this is one thing I have to ask you. I don't know if anybody in here is, but,' he says, 'is anybody here going to refuse induction?'

"And I just raised my hand. At that time he had another man come and take me down to the executing captain's office.

"Q You were asked quietly and courteously, I presume, to accompany them down there?

"A Yes, sir.

"Q When you got down to the captain's office you indicated that an enlisted man administered the oath to you.

"A Yes, sir.

"Q And that at that time you refused to step forward?

"A Yes."

5. In his closing brief before our court, appellant asserted, for the first time, that he was not given the warning of the penalty for refusing induction, as required by the Army Regulation. All evidence which bears upon this allegation is quoted in notes 3-4, *supra*. That evidence does not support appellant's new contention; therefore, we do not reach the legal point which he now attempts to raise.

tended to, and did, refuse to submit to induction, it is no defense that minor departures from the ordinary induction procedure occurred. *Cf. United States* v. *Spiro*, 384 F.2d 159 (3d Cir. 1967), *cert. denied*, ... U.S. ..... (1968); *United States ex rel. Lipsitz* v. *Perez*, 372 F.2d 468 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967); *United States* v. *Lawson*, 337 F.2d 800, 812 (3d Cir. 1964), *cert. denied*, 380 U.S. 919 (1965); *Yaich* v. *United States*, 283 F.2d 613, 619-20 (9th Cir. 1960).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, June 21, 1968

Before: BARNES and ELY, Circuit Judges, and FOLEY, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed June 6, 1968, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX C

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Universal Military Training and Service Act of 1951, As Amended (50 U.S.C.A. App. § 456 (j)).

(j) Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period—equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and

hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

LIBRARY
SUPREME COURT, U. S.
No. 316

Office-Supreme Court, U.S.
FILED
AUG 14 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

JAMES DONALD EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 316

JAMES DONALD EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted of wilfully failing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for a period of three years (R. I, 28). The court of appeals unanimously affirmed (Pet. App. A).

The facts of the case, summarized in the opinion of the court of appeals (Pet. App. A, 1-2), are not in

dispute. Petitioner registered with his local board in January 1963, and filed a classification questionnaire in April 1964 in which he claimed to be a conscientious objector. Subsequently, he completed and filed a special form for conscientious objectors. Thereafter, in June 1964, the local board classified petitioner I-A and mailed a notice of this classification to him which explained his appeal rights. No administrative appeal was taken by petitioner.

On May 20, 1965, petitioner was ordered to take an armed forces physical examination on June 11, 1965. He reported as scheduled, was examined, and was found acceptable. Subsequently, petitioner notified the local board that his name had been legally changed from James Donald Humphreys to James Donald Edwards, and requested a new notice of classification reflecting this to replace the old one. On October 25, 1965, petitioner was again classified I-A by his local board, and a notice of the classification was mailed to him shortly thereafter. No appeal was taken from this classification either.

On December 23, 1965, petitioner was ordered to report for induction on January 11, 1966. He reported to the induction center as ordered, took a pre-induction examination and completed various forms preliminary to induction. However, he thereafter refused to be inducted into the armed forces. The present indictment and his conviction for failing to submit to induction followed.

ARGUMENT

Petitioner contends that he should not be precluded from challenging his I-A classification in his criminal trial for refusing to submit to induction, despite his failure to exhaust his administrative remedies by appealing that classification within the Selective Service System. He admittedly received the notices of classification with instructions explaining his appeal rights. Indeed, he conceded at trial that he was fully aware of his right to appeal, but decided not to do so because he thought the state appeal board would deny relief (Tr. 22). There is thus no circumstance here that warrants departure from the settled principle that failure to pursue a readily available administrative appeal bars a subsequent challenge to the validity of a registrant's classification in a criminal prosecution for refusing induction into the armed forces. *E.g.*, *Falbo* v. *United States*, 320 U.S. 549; *Estep* v. *United States*, 327 U.S. 114, 123; *Kidd* v. *United States*, 386 F. 2d 422, 423 (C.A. 10); *Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Noland* v. *United States*, 380 F. 2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945; *Thompson* v. *United States*, 380 F. 2d 86, 88-89 (C.A. 10); *Capson* v. *United States*, 376 F. 2d 814 (C.A. 10), certiorari denied, 389 U.S. 901.[1]

---

[1] Nothing in *Dickinson* v. *United States*, 346 U.S. 389, a ministerial exemption and not a conscientious objector case, is to the contrary. As the court of appeals noted, "The record contains no indication that [petitioner] ever attempted to obtain a IV-D classification [ministerial exemption] from [his] board" (Pet. App. A, 4, n. 2).

Pursuant to congressional authority, substantial administrative procedures for review of Selective Service classifications have been provided (see 32 C.F.R. 1624-1627), one purpose of which is to render frequent recourse to the courts unnecessary.[2] This is distinctly not a situation where, because of a settled interpretation or approach by the Selective Service System, it could be said that nothing might conceivably be gained by an administrative appeal. Here the whole appeal system in effect at that time was designed to develop the facts which would or would not support petitioner's claim that he was a genuine conscientious objector. Petitioner, although knowing of his right of appeal, failed to take advantage of the process available for development of the pertinent facts. Not having done so, he is in no position to claim that the Selective Service System erred with respect to the "basis in fact" for his classification, as the court below properly concluded (Pet. App. A, 2-3).

[2] Indeed, at the time of petitioner's classification, there was an especially thorough administrative process for review of claims for conscientious objector status (32 C.F.R. 1626.25(a)-(e), rescinded by Executive Order 11360, 32 Fed. Reg. 9787, 9792 (July 4, 1967)).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

AUGUST 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 316139 88